the Guidelines are treated as advisory.'" *United States v. Washington*, 398 F.3d 306, 313 (4th Cir. 2005) (quoting *United States v. Hughes,* 396 F.3d 374, 379 n. 8 (4th Cir. 2005)). The Court should now resolve the conflict among the circuit courts of appeals as to whether the procedural default rule may be used to prevent application of this Court's holdings in *Blakely* and *Booker* in cases pending on direct review and not yet final.

At issue for petitioner is not merely some filigree of the doctrine of procedural default. Petitioner was deprived of his Constitutionally protected right to trial by jury. At the time he forfeited that right, neither petitioner, nor his lawyers knew that such rights existed. It was only after this Court's decision in Blakely that petitioner, his lawyers and everyone else for that matter learned of the existence of such Sixth Amendment rights. Petitioner, whose case was on direct appeal, immediately moved for relief before the Eleventh Circuit. That court ruled that petitioner having asserted his claim at the earliest opportunity—had asserted it too late, and had lost it forever. Because the Eleventh Circuit has placed its own rules above this Court's mandate, the petition for certiorari should be granted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this honorable Court grant his petition for rehearing and his petition for a writ of certiorari.

Respectfully submitted,

THOMAS A. WITHERS
Counsel of Record

GILLEN PARKER & WITHERS, L.L.C.
8 East Liberty Street
Savannah, Georgia 31412
(912) 447-8400

CERTIFICATE OF COUNSEL

I, Thomas A. Withers, hereby certify, pursuant to Rule 44.2 of the Supreme Court Rules, that I am the attorney for Petitioner in this case; that this Petition for Rehearing is limited to intervening circumstances of substantial or controlling effect, or other substantial grounds not previously presented; and that it is presented in good faith and not for delay.

Dated: October 28, 2005.

Respectfully submitted,

Thomas A. Withers

THOMAS A. WITHERS
Counsel of Record

GILLEN PARKER & WITHERS, L.L.C.
8 East Liberty Street
Savannah, Georgia 31412
(912) 447-8400